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In the Supreme Court of the United States

OCTOBER TERM 1964

No. 945

STATES STEAMSHIP CO., a Corp.,
Petitioner

vs.

AMERICAN SMELTING & REFINING CO., a Corp.,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMERICAN SMELTING & REFINING Co., a Corp., *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case.

OPINION BELOW

The Findings at Fact, Conclusions of Law and Decree of the United States District Court for the Northern District of California, Southern Division are not reported but are printed at Record, Volume I, pp. 24-25.

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported at 339 F. 2d 66 (9th Cir. 1964); a copy is appended hereto as Appendix A.

JURISDICTION

The United States District Court for the Northern District of California, Southern Division has jurisdiction of this admiralty matter under the United States Constitution Article III Sec. 2 and under the statute implementing that provision of the Constitution, 28 U.S.C. § 1333, 63 Stat. 101.

The judgment sought to be reviewed was filed and recorded in United States Court of Appeals on December 4, 1964. No requests or orders concerning rehearing or extension of time within which to petition for certiorari have been made.

Jurisdiction of the Supreme Court of the United States of America to review the judgment in question is granted by 28 U.S.C. 1254(1) 62 Stat. 928. 90 days have not expired.

QUESTIONS PRESENTED

The immediate issue is whether this Court will correct a novel and erroneous construction of a United States Treaty the provisions of which are repeated in a federal admiralty statute and are of paramount importance to the carriage of goods by sea in foreign commerce.

The treaty involved is known as the Brussels Convention of 1924.[1] The statute is the Carriage of Goods by Sea Act, 1936 (herein "COGSA").[2] The collateral question involved is the construction of COGSA Sec. 3(6).[3]

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1. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading; Brussels August 15, 1924, 51 Stat. 233, U. S. Treaty Series No. 931.

2. 46 U.S.C. § 1300-1315, 49 Stat. 1207-1213.

3. 46 U.S.C. 1303(6), 49 Stat. 1208.

PROVISIONS OF CONSTITUTION, TREATY AND STATUTE INVOLVED

The provisions of the Constitution, involved in this case are as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the supreme Law of the Land." U. S. Const. Art. VI, para. 2.
>
> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made under their Authority . . . —to all Cases of admiralty and maritime jurisdiction; . . ." U. S. Const. art. 3 § 2.

The provision of the United States Treaty involved is as follows.

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."
>
> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading; Brussels Aug. 15, 1924 Art. 3(6), 51 Stat. 250, para. 4; U. S. Treaty Series No. 931.

The provision of the United States Statute involved is as follows:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . ." 46 U.S.C. 1303(6), para. 4; 49 Stat. 1208.

STATEMENT OF THE CASE

All facts have been agreed upon by formal stipulation, (R-I-17-24) and may be summarized as follows:

Petitioner, States Steampship Company ("Shipowner"), and Respondent, American Smelting & Refining Co., ("Shipper"), entered into a contract of affreightment under which shipowner undertook to and did transport a shipload of ore owned by Shipper from Poro, Philippine Islands, to Tacoma, Washington. (R-I-22, 23).

The contract of affreightment is evidenced by a bill of lading which expressly incorporates the provisions of COGSA (R-I-22 and R-II-2).

When the goods were laden, the vessel was not properly prepared to receive them. The vessel was, therefore "unseaworthy" and Shipowner thereby violated its contract of affreightment. (R-I-22-23).

By virtue of this unseaworthy condition the vessel took a serious list shortly after departure from the loading port and was required to put into a port of refuge. Salvors remedied the unseaworthy condition. (R-I-22). Thereafter the vessel proceeded to Tacoma, its destination, where the goods were delivered on February 11, 1957. (R-I-23).

Upon successful performance of the salvage operations both the Shipowner and Shipper became independently and directly obligated to salvors for their respective shares of the salvage services.

Prior to arrival of the vessel at Tacoma, and prior to actual delivery of the goods, Shipper was informed of the facts of the salvage operations and the lien thereby created against the cargo. In order to obtain delivery of the goods free from such lien, Shipper executed an agreement under which it guaranteed to pay its share of the salvage expense. (R-I-23 and R-II-16).

Thus by virtue of Shipowner's breach of its contract of affreightment Shipper was damaged in the amount of its salvage obligation. In this suit Shipper seeks to recover for that damage. Shipper's suit was not commenced until March 16, 1959, two years and one month after delivery of the cargo. (R-1-23).

As a complete bar to the action Shipowner has asserted the statute of limitations contained in COGSA and in the Brussels Convention of 1924. The COGSA provision which establishes the time limit for commencing suit by a shipper against a carrier for loss or damage reads as follows:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. . . ." 46 U.S.C. 1303(6) para. 4, 49 Stat. 1208.

That portion of the Brussels' Convention which limits the time a shipper may commence suit for loss or damage is identical with the quoted COGSA provision. Brussels Convention § 3(6) 51 Stat. 250.

It is conceded that this suit was not commenced within the time specified in the statute and treaty.

To avoid the limitation period prescribed by statute and by treaty, Shipper has labeled its cause of action one for "indemnity". In other words Shipper, in effect, has said, "Shipowner has broken its contract of affreightment and has caused me damage, but since a suit for loss or damage is time barred I designate the action one for 'indemnity' and, on this basis, seek recovery of the amount of my loss." Shipowner, in effect, has said: "Regardless of labels, the gravamen of Shipper's complaint is that we have violated our contract of affreightment. A breach of the affreightment is conceded and we concede the Shipper has sustained loss and

damage, but, because of Shipper's delay in asserting the claim, the cause of action is barred."

Shipper urges that liquidation of the precise amount of Shipper's obligation to the salvor was accomplished by arbitration and, although this suit was not commenced within one year of delivery as required by COGSA, it was commenced within one year of the arbitration award and within one year of Shipper's payment to salvors. Shipowner answers this by pointing out that Shipper's obligation to salvors arose upon the successful performance of the salvage services; that Shipper sustained loss and damage as soon as it became obligated to salvors; that Shipper thereupon had a perfected cause of action against Shipowner; that these facts all occurred prior to delivery of the goods and consequently Shipper's cause of action accrued prior to delivery of the goods; that the accrual of a cause of action and the right to sue thereon are not dependent upon final determination or liquidation of the amount of one's damages and that a statute of limitations is not tolled while the precise amount of damages is being ascertained.

ARGUMENT

A. Importance of the Issue

Certiorari should be granted because:

1. The statute in question was enacted by Congress in conformity with an International Convention entered into by the leading maritime nations of the world.[4]

The United States, as a leading exponent of this type of international law, should be particularly careful to avoid *initiation* of an improper construction of that law.

2. The decision results in a novel, unique and erroneous

4. British Shipping Laws, 1963, Vols. 2 and 3 pp. 1291, 1305-1308, 1321-1322, 1327.

construction of a federal statute and a United States treaty.

After nearly thirty years of experience with this statute the maritime industry is, for the first time, presented with a construction which renders uncertain the time for litigating claims arising out of the contract of affreightment.

3. The decision places an interpretation on the statute and treaty which endorses and invites future litigation inconsistent with the underlying policy of the statute and of the treaty in that:

(a) the decision introduces uncertainty whereas the underlying policy sought to achieve certainty in the handling of maritime claims;[5]

(b) the decision threatens diverse interpretations of treaty and statutory provisions, whereas the underlying policy of the treaty and of the statute was to promote uniformity.[5]

4. The substantial federal question presented has not been decided by this Court.

B. The Error Below

The key question is: When did Shipper's cause of action arise?

The Court of Appeals decision reaches its conclusion by assuming the answer. The decision states that Shipper's cause of action first arose when payment was made by Shipper to the salvors; that payment could not be made until the amount due was liquidated by the arbitration; that the arbitration award was not made until after the statutory one year limitation period had elapsed; that since the law will not be construed to bar a cause of action

5. Preamble, Brussels Convention, 51 Stat. 233.

before it arises, the COGSA limitation period does not apply to the case.

This conclusion is based upon a false premise. It is erroneously assumed that Shipper's cause of action did not accrue until the amount of Shipper's salvage obligation was liquidated by the arbitration or was actually paid.

Shipowner does not seek a rule which would bar a cause of action before it accrued. On the other hand Shipowner points out that Shipper's cause of action accrued not only prior to determination of the amount due but actually *prior to delivery* of the goods to Shipper.

Once the salvage services were successfully performed the cargo and Shipper then and there became obligated to salvors for cargo's share of the salvage expense.[6] By accrual of this obligation Shipper then sustained the detriment which constituted Shipper's loss and damage. Shipper then had a cause of action against Shipowner to recover for that damage.[7] The accrual of that cause of action was long prior to the expiration of the statutory one year period. In fact the cause of action accrued prior to the *commencement* of the one year period since the statute fixes the date of *delivery* as the starting point for the one year period.[8]

It follows that any apprehension that Shipper might be barred before its cause of action accrued is purely hypothetical and fanciful. If a state of facts could arise where

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6. *Oelwerke Tuetonia v. Erlenger*, 248 U.S. 521, 63 L. ed. 399, 39 S. Ct. 180 (1919); *The Sabine* (1879) 101 U.S. 384, 25 L.ed. 982; Norris *Law of Salvage* (1958) § 390.

7. *Wilcox v. Plummer*, 4 Pet. (29 U.S.) 172, 7 L. ed. 821 (1830); *Corporation of the Royal Exchange Assurance v. United States*, 75 F. 2d 478, 1935 A.M.C. 278 (2d Cir. 1935); *H. Herfurth v. Acker*, 177 F. 2d 38 (D.C. Cir. 1949).

8. Carriage of Goods by Sea Act, 1936, Sec. 3(6), 46 U.S.C. 1303(6), 49 Stat. 1208.

the cause of action would not accrue until this limitation period had expired, we would expect the Court to protect the Shipper. But this is not such a case; nor has such a case been brought to our attention.

It is frequently helpful to consider the converse situation: suppose the Shipper had sued Shipowner while the arbitration proceedings were pending, but during the one year period following delivery. If Shipper's cause of action had not then accrued, Shipper's suit would have been premature and a motion to dismiss would lie. We know of no case so holding.[9]

To support Shipowner's contention that Shipper was damaged and its cause of action accrued before delivery, we urge the following:

Salvors' claim is not one against the Shipowner only. It is a separate and independent claim against Shipper for Shipper's share of the salvage services based upon the value of the cargo salved.[10] Salvor also has a separate and independent claim against Shipowner for Shipowner's share of the salvage services based upon the value of the vessel.

Salvors' claim became perfected when the salvage services were successfully accomplished.[11]

From the above it follows that Shipper became obligated to salvors before the goods were delivered to Shipper.

The fact that the amount of Shipper's loss was not determined or liquidated until the arbitration was concluded is immaterial. It is not essential to the accrual of a cause of action that the amount of loss be known. The cause of action accrues when the fact of loss first arises. The lo-

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9. Cf. *Herfurth v. Acker, supra* note 7.

10. *Oelwerke Tuetonia v. Erlanger, supra;* R-11-13.

11. Norris, *Law of Salvage* (1958), § 300.

had occurred when Shipper became obligated to salvor. Liquidation of damages is not a condition precedent to the accrual of a cause of action.[12]

No equitable issue is involved based upon any lack of knowledge of the situation on the part of the Shipper. The performance of the salvage services in the Philippine Islands imposed a lien against the goods in favor of salvors. Shipper not only knew of that lien before the goods were delivered at Tacoma, but, in order to obtain the goods free from that lien, actually posted a guarantee, *prior* to delivery conditioned upon payment of the amount to be awarded salvors.[13]

The fact that the damage involved is measured by a payment to a third party is immaterial. This device has been attempted. It has been rejected.[14] The contract here expressly incorporates its own statute of limitations. This condition has not been met by Shipper.

CONCLUSION

The clear meaning of a statute should not be nullified by resort to semantic legerdemain. This applies a priori to a treaty.

The policy of the United States and the other maritime nations to achieve uniformity and certainty should not be thwarted.

If the reasonable discipline imposed by this statute is to be ignored in the United States for the benefit of dilatory shippers, we respectfully submit that our foreign confreres

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12. *Wilcox v. Plummer, supra; Corporation of the Royal Exchange Assurance v. U. S., supra; Herfurth v. Acker, supra,* note 7.

13. R-II-16.

14. *Herfurth v. Acker, supra,* note 7.

should be so advised by an authority of no less dignity than this Court.

Dated: March 1, 1965

Respectfully submitted,

LILLICK, GEARY, WHEAT, ADAMS & CHARLES

By GILBERT C. WHEAT
GRAYDON S. STARING
H. DONALD HARRIS, JR.

CERTIFICATE OF SERVICE

Service of the within Petition for Certiorari was made upon counsel for Respondent in the following manner:

By delivering five copies thereof on March ....., 1965 to the offices of Hall, Henry, Olivery & McReavy, 351 California Street, San Francisco, California, and by mailing, air mail, two copies thereof on March ....., 1965, to Symmers, Fish & Warner, attention William G. Symmers, 37 Wall Street, New York, N. Y.

GRAYDON S. STARING

(Appendix A follows)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 19,274

States Steamship Company, et al.,
Appellant,

vs.

American Smelting & Refining Company,
Appellee.

[Dec. 4, 1964]

Appeal from the United States District Court for the
Northern District of California
Southern Division

Before: ORR, JERTBERG and MERRILL, Circuit Judges.

ORR, Circuit Judge:

In this appeal we have one question for decision, to wit: Is appellee's claim time-barred by the one-year limitation provision of Section 3(6) of the Carriage of Goods by Sea Act of 1936 (COGSA)? (46 U.S.C. 1303(6)). We affirm the trial court in its determination that it is not.

Libelant-Appellee is the American Smelting and Refining Company (herein Asarco). The Respondent-Appellant is the States Steamship Company (herein States).

The facts have been stipulated. They are:

". . . 3. At all times mentioned herein States owned and operated the vessel formerly known as the *SS Charles E. Dant.*"

4. On November 27, 1956 approximately 8400 tons of copper concentrates were laden aboard the *SS Charles E. Dant* at Poro Point, La Union, Philippines, consigned to Asarco at Tacoma, Washington.

5. Asarco acquired title to said copper concentrates when they were loaded aboard the *SS Charles E. Dant* and at all times hereinafter mentioned was the owner and consignee of said concentrates.

6. The Bill of Lading constituting the contract of affreightment which governs the rights and liabilities of the parties hereto, insofar as it is applicable, is attached as Exhibit A.

7. Shortly after departure from Poro Point on November 27, 1956 the *SS Charles E. Dant* took a serious list, necessitating salvage services which were rendered and which enabled the vessel to continue the voyage.

8. Said salvage services were rendered pursuant to a Salvage Agreement entered into by States on behalf of the vessel and her cargo . . . Security was given to salvor on behalf of the vessel and her cargo in order to release the vessel and cargo from the salvor's lien.

9. On January 17, 1957 Asarco entered into an Average Agreement with States in order to obtain possession of the cargo . . .

10. On or before February 11, 1957 said shipment of copper concentrates was delivered to Asarco at Tacoma, Washington.

11. The amount of the salvage award was arbitrated between salvor on the one hand and Asarco and States, on the other, in accordance with the Salvage Agreement. On October 28, 1958 the Salvage Award became final. Thereafter Asarco and States each paid to salvor its respective share of the amount awarded by the arbitrators.

12. On March 16, 1959 Asarco filed the libel in this action to recover its portion of salvage paid.

13. States plead, in defense, the one-year statute of limitations contained in the United States Carriage of

Goods by Sea Act of 1936, Section 3(6), 46 U.S.C. 1303(6).

14. If the court concludes that this cause is time-barred, the libel should be dismissed with prejudice.

15. If the court concludes that this cause is not time-barred, States is liable in personam and as claimant of the *SS Charles E. Daut* in such amount as may be determined by the Court or agreed by the parties."

Section 3(6) of COGSA provides:

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of *loss or damage* unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and receiver shall give all reason-

able facilities to each other for inspecting and tallying the goods." (emphasis provided)

Appellant's contention is, basically, that "loss or damage" as used in the above cited statute covers any claim for damages by a shipper where liability is based upon a carrier's breach of its contract of affreightment. Appellant cites cases in support of its contention, wherein intangible damage to the cargo interest—such as late delivery or misdelivery—has been held to be loss or damage within the meaning of Section 3(6). It argues that this case is one in which an intangible injury to the cargo appears and hence it comes within the unmodified and unrestricted "loss or damage" provision.

Viewing the context in which the limitation provision is set, we feel that logic and sound analysis require that "loss or damage" be interpreted in a narrower sense than contended for by appellant. The wording compels the conclusion that said provision was intended to apply only to claims which relate directly to a breach of a carrier's duty to make timely delivery of the goods in good order and condition.

The cases are not at variance with this view. The limitation provision of Section 3(6) has been applied mainly to instances involving damage directly to the cargo. It has also been applied where there has been delay in, or failure of, delivery or departure. See *Commercio Transito Internazionale, Ltd. v. Lykes Bros. Steamship Company*, 243 F.2d 683 (2d Cir. 1957); *Badhwar v. Colorado Fuel and Iron Corp.*, 138 F. Supp. 595 (S.D.N.Y. 1955), aff'd, 245 F.2d 903 (2d Cir. 1957), cert. denied, 355 U.S. 862 (1957); *Singer Hosiery Mills of New York v. Cunard White Star, Ltd.*, 102 N.Y.S.2d 762 (Munic. Ct. N.Y.C. 1951); *Albert Isbrandtsen Company*, 160 N.Y.S.2d 772 (Sup. Ct. 1957). In the above cited cases the damage arose directly from and

was related directly to a failure to make a proper delivery of the cargo owner's goods.

This Act, derived from the terms of the Brussels Convention of 1924, has been adopted by many nations, but in no case that has come to our attention has it been held that an action by a cargo owner to recover salvage paid is within the limitation provision here under consideration. A contention similar to this, however, was presented in the case of *Goulandris Bros., Ltd. v. B. Goldman & Sons, Ltd.*, [1957] 2 Lloyd's Rep. 207 (Q.B.D., Com.Ct.), and was rejected. There, at page 222, the court stated that "the loss or damage referred to must be loss or damage which is related to the cargo owner's goods." Appellant states that the rule in *Goulandris* was overturned by the subsequent House of Lords decision in *Anglo-Saxon Petroleum Company v. Adamastos Shipping Company, Ltd.*, [1957] 1 Lloyd's Rep. 79 (Q.B.D.), [1957] 2 All E.R. 311 (C.A.), [1958] 1 All E.R. 725 (H.L.). We do not so read that case. The British authorities, though they now indicate that the words "loss or damage" in the limitation provision here involved are broad enough to include loss by delay or misdelivery, do not go so far as to say that a claim such as is presented in the instant case constitutes a suit for "loss or damage" within such provision. See Carver, 2 *British Shipping Laws* §§ 224-30 (1963).

We conclude that a distinction between the cause of action presented here and those that have been held to be governed by Section 3(6) is clearly drawn. The instant action is in reality one for indemnification, the right to which arises from the carrier's alleged violation of the duty of due diligence imposed upon him by law.[1] The gravamen of

1. Article 3 of COSGA is the source of this duty, a duty which exists regardless of any provision in the contract of affreightment

appellee's claim is that: Appellant failed to exercise due diligence in the carriage of appellee's goods; because of this a salvage operation was necessary and the appellee, in order to get delivery of the goods, was obliged to agree to pay, and paid, its general average share of the salvage costs; now it is seeking reimbursement for the amount paid, which burden, as between it and appellant, should be borne by appellant. This spells out an indemnity action—appellee is seeking indemnification for salvage paid pursuant to the Average Agreement. See *Restatement of Restitution* § 76 (1936); *Hidick v. Orion Shipping and Trading Company*, 157 F. Supp. 477 (S.D.N.Y. 1957); *Tice Towing Line v. James McWilliams Blue Line*, 51 F.2d 243 (S.D.N.Y. 1931), modified, 57 F.2d 183 (2d Cir. 1932).

That it was neither the intent of the Brussels Convention of 1924 in drafting the section of the Act here under consideration, nor the intent of the Congress in enacting it, to include such indemnity actions within the claims governed by Section 3(6) of COGSA is amply supported by the circumstances involved.

By the terms of Section 3(6) the statute of limitations begins to run at the time of *delivery*. In actions that involve damage directly to the cargo or relate directly to the cargo the statute of limitations traditionally and logically begins to run at the time of delivery. It is at this time that the shipper becomes aware of "loss or damage" and generally at this time that the cause of action accrues. Such is not the case with the usual indemnity claim, where a cause of action does not accrue until the indemnitee has made actual *payment*. See *Restatement of Restitution* § 77 (1936); 3

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incorporating a requirement of due diligence into the agreement between the parties. It would not seem, however, to matter whether this duty is viewed as arising as a matter of law or by virtue of the shipping contract—the indemnity nature of the action here is the same.

Moore's Federal Practice § 14.09 (2d Ed. 1963); *Chicago, Rock Island & Pacific Railway Company v. United States*, 220 F.2d 939 (7th Cir. 1955); *Christianssand Shipping Company, Ltd. v. Marshall*, 31 F.2d 686 (3rd Cir. 1929); *Hidick v. Orion Shipping and Trading Company, supra*, pp. 487-88. The date of payment, and thus the date when a party is in a position to sue, will seldom coincide with the date of delivery. Thus imposing a "time of delivery" starting date upon actions such as we have before us would give rise to an illogical and often unreasonable situation. For example, in the instant case payment was made, and the right to recovery arose, after October 28, 1958. This was some 8 months after the statute of limitations under Section 3(6) had run. Appellee *could not* make payment until subsequent to the arbitration of the salvage claim, and therefore ordinarily *could not* sue to recover payment until the amount of salvage had been determined and payment made. By that time the statute of limitations contained in Section 3(6) had run. No equitable result can be found in such an interpretation.

Appellant urges that a procedure could be employed that would allow a suit to be filed in such a case at the time of delivery, and then stayed until determination of the amount of the award and payment thereof. To impose such a burden upon the claimant to anticipate at the time of delivery the nature and extent of his claim for damages, and to impose a burden upon the courts to indulge in this staying procedure, cannot be said to have been within the reasonable contemplation of Congress.

Legislative history is pointed to for the purpose of sustaining the construction which appellant would place on the provision under consideration. We do not believe it in any manner detracts from the construction we have adopted.

Affirmed.